NO. 276.

IN THE

nited States Circuit Court of Appeals

For the Ninth Circuit.

F. MIGEON, BENJAMIN TIBBEY, and N. B. RINGELING,
Appellants,
vs.
E MONTANA CENTRAL RAILWAY COMPANY, a Corporation,
Appellee.

Brief of Argument for Appellee.

eal from the United States Circuit Court, for the District of Montana.

RIAL PTG. CO. GREAT FALLS, MONT

NO. 276.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

A. F. MIGEON, BENJAMIN TIBBEY, and N. B. RINGELING,
Appellants,
vs.
THE MONTANA CENTRAL RAILWAY COMPANY, a Corporation,
Appellee.

Brief of Argument for Appellee.

Appeal from the United States Circuit Court, for the District of Montana.

INDUSTRIAL PTG. CO. GREAT FALLS. MONT

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

A. F. MIGEON, BENJAMIN TIBBEY, and N. B. RINGELING,
Appellants,

VS.

THE MONTANA CENTRAL RAILWAY COMPANY, a Corporation,
Appellee.

Brief of Argument for Appellee.

Appellants' Specification of Errors, 1 to 10 inclusive.

The Appellants have made a specification of thirty-one errors. The record does not disclose any rulings to which specifications 1 to 10 inclusive can apply. On page 4 of appellants' brief, and at the bottom of page 538 of the printed transcript of the record, is an un-

signed "note" with the word "Clerk" appended thereto, which is probably intended to be explanatory of these specifications of error. This note is no part of the record, and if the statement contained therein is true it does not appear that any steps were ever taken by the appellants to avail themselves of the understanding therein set forth. There is no record by which it is shown to this court what rulings, if any, were made by the court below with respect to any of the matters referred to in these ten specifications of error, and we fail to see how this court could determine from this record that the court below erred with respect to any of the matters so complained of; indeed, the appellants do not complain that there was any error committed in ruling upon any of the objections referred to in these ten specifications of error. It does not appear from the record, nor is it claimed by the appellants, that the court below sustained any of the several objections interposed by the appellee and referred to in these specifications, or that it overruled any of the objections made by the appellants. We think it therefore unnecessary to consider whether there would, or would not, have been error if the court had sustained any of the objections referred to.

Specifications No. 13 to 20 inclusive.

Specifications numbered 13 to 20 inclusive relate to errors alleged to have been committed by the court in receiving testimony against the objection of the appellants. The rulings referred to in these assignments are treated, in behalf of the appellants, as if they had been made upon the trial of an action at law before a jury, and it is apparently considered that if any of the same were technically erroneous the decree would, on this account, need to be reversed.

But, if evidence was improperly received, this of itself would be no ground for reversing the decree. This being a chancery cause, the true inquiry should be whether or not there is competent evidence in the record, taken in connection with the pleadings, to sustain the decree that was entered.

See Merchants' National Bank vs. Greenhood, 41 Pac. Rep., at page 267, and cases there cited and reviewed; also

Holmes vs. State, 18 So. Rep., 529;

Scroggin vs. Johnston, 64 N. W. Rep. 236, and cases there cited;

Mammoth Mining Co. vs. Salt Lake Foundry & Machine Co., 14 Sup. Ct Rep., 384.

But upon the merits the evidence objected to was

signed "note" with the word "Clerk" appended thereto, which is probably intended to be explanatory of these specifications of error. This note is no part of the record, and if the statement contained therein is true it does not appear that any steps were ever taken by the appellants to avail themselves of the understanding therein set forth. There is no record by which it is shown to this court what rulings, if any, were made by the court below with respect to any of the matters referred to in these ten specifications of error, and we fail to see how this court could determine from this record that the court below erred with respect to any of the matters so complained of; indeed, the appellants do not complain that there was any error committed in ruling upon any of the objections referred to in these ten specifications of error. It does not appear from the record, nor is it claimed by the appellants, that the court below sustained any of the several objections interposed by the appellee and referred to in these specifications, or that it overruled any of the objections made by the appellants. We think it therefore unnecessary to consider whether there would, or would not, have been error if the court had sustained any of the objections referred to.

Specifications No. 13 to 20 inclusive.

Specifications numbered 13 to 20 inclusive relate to errors alleged to have been committed by the court in receiving testimony against the objection of the appellants. The rulings referred to in these assignments are treated, in behalf of the appellants, as if they had been made upon the trial of an action at law before a jury, and it is apparently considered that if any of the same were technically erroneous the decree would, on this account, need to be reversed.

But, if evidence was improperly received, this of itself would be no ground for reversing the decree. This being a chancery cause, the true inquiry should be whether or not there is competent evidence in the record, taken in connection with the pleadings, to sustain the decree that was entered.

See Merchants' National Bank vs. Greenhood, 41 Pac. Rep., at page 267, and cases there cited and reviewed; also

Holmes vs. State, 18 So. Rep., 529;

Scroggin vs. Johnston, 64 N. W. Rep. 236, and cases there cited;

Mammoth Mining Co. vs. Salt Lake Foundry & Machine Co., 14 Sup. Ct Rep., 384.

But upon the merits the evidence objected to was

admissible. In the case of Iron Silver Mining Co. vs. Mike & Starr Gold & Silver Mining Co., 143 U. S., in considering what constitutes a known vein so as to exclude the same from the placer patent, the court says:

"It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify the designation of known veins or lodes. To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account and to justify their exploitations."

At page 405, in the same opinion, the court says:

"The amount of ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one that justified exploitation and working."

Specification No. 11.

Rule No. 24 of this court requires that, in case where the error alleged is the admission or rejection of evidence, the specifications shall quote the full substance of the evidence admitted or rejected, and further that, in the brief of argument, there shall be a reference to the pages of the record relied upon in support of each point.

This specification does not conform to the rule in that there is no quoting of any evidence admitted or rejected upon which the specification rests. The testimony of the witness Gillie covers altogether more than thirty pages of transcript. On page 23 of the brief there is a reference to pages 281 and 304 of the transcript as supporting this assignment of error. At page 281 it appears that objection was made to some such testimony as is referred to in this specification of error, but there does not appear to have been any ruling upon the objection, and in fact the question to which objection was made was withdrawn by the appellants. If we search the whole record we do not find that the court ever sustained any objection by which evidence was excluded on the part of the witness Gillie, such as Mr. Clark, at page 304 of the transcript, assumes was excluded. It would appear from the record that the counsel for appellants excepted to a ruling that the court never made.

The above sufficiently disposes of this specification; but, if the whole record be examined, it will be found that the examinations made by Mr. Gillie had been recently made, and that the prospect holes referred to had been recently sunk,—at least many years after the application for placer patent. Inasmuch as the issue in

this case relates to the existence of a "known lode" at the date of the application for placer patent, namely December 17, 1878, we do not see how the exclusion of evidence, touching recent discoveries within the limits of the land involved, could prejudice appellants.

The remaining assignments of error are largely in the nature of an argument in opposition to the legal views expressed by the court below in the opinion filed.

The decree of the court is shown at page 532 of transcript. It there appears that the court found as facts:

"That the plaintiff is the owner of, in the possession of, and entitled to the possession of all and singular the premises set out and described in the complaint herein, and hereinafter described.

"That said premises constitute and are a portion of mineral entry No. 511 for which application for patent from the United States was duly made upon December 17, 1878, and for which a United States patent was duly issued to the applicants therefor on July 28, 1880.

"That at the time said application for patent there was no lode of quartz containing gold, silver, copper or other metals known to exist within the exterior boundaries of said mineral entry No. 511.

"That all and singular the averments of plaintiff's complaint and replication herein are true, and that the averments of the answer of the defendants herein inconsistent therewith are not true, and that plaintiff is entitled to a decree as prayed for in its complaint herein."

Upon this finding of facts the court granted the relief prayed for in the complaint.

If this finding of facts is sustained by the evidence in the case there can be no doubt that the court was justified and indeed required to grant the relief which was prayed for.

There is no serious attempt on the part of the appellants to show that the finding of facts is unsupported by the evidence. It is to be inferred, from the specifications of errors made, that the appellants believe that the court might have reached a different conclusion or finding, as to the existence of a "known lode" at the time of the application for a placer patent, if it had not entertained certain views as to the law, which are thought by the appellants to be erroneous. It is true that in the opinion filed (found at page 519 of the transcript) the court discusses at some length the question as to what constitutes a "known lode" within the meaning of the law. Even if the views there ex-

pressed were erroneous it would not follow that the court's findings of fact must be set aside; and, so long as the findings of fact stand, the decree is unassailable.

It appears from the recital of the petition for appeal (see page 553) that, subsequent to the entering of this decree, there was a petition for rehearing, and an order overruling such petition. In denying the petition for rehearing the court below filed a supplemental opinion which has not been incorporated in the transcript on appeal. Rule 14 of this court requires the record to contain a copy of the opinion, or opinions, filed in the case below. If the court's findings of fact are to be examined, and either upheld or rejected upon a consideration of the legal views entertained by the court below rather than an examination of the evidence in the cause, it is certainly important that this rule should be complied with, in order that this court may see just how far the findings of fact may have been affected by legal theories. In the opinion filed below, upon the petition for rehearing, the court reviewed most of the criticisms now made by the appellants upon the opinion first filed, and pointed out quite clearly that it was not necessary to the findings or decree that all the views expressed in the opinion first filed should be sustained.

The real question in the case is whether there was a "known lode" within the limits of the ground in controversy, at the time of the application for the placer patent in December of 1878. The exterior boundaries of the "Morning Star" location included part of the ground in controversy, but not the whole of it. The discovery upon the "Morning Star" was outside of the lands in suit. The "Childe Harold" location was made subsequent to the issuing of the patent under which the appellee claims, and was based upon the supposed existence of a lode at the point of the original discovery of the "Morning Star." It was so located as to extend nearly 750 feet further into the lands covered by the placer patent than did the "Morning Star" location. We do not understand the appellants to now claim that they can hold under the "Childe Harold" location any territory not covered by the "Morning Star."

As to the ground covered by the "Morning Star" location, it is claimed by the appellants that the same is excepted from the placer patent, under which the appellee claims:

First, because the ground included within the exterior limits of the "Morning Star" location was not, at the time of the application for the placer patent, a part of the public domain, and hence not subject to grant on

the part of the Government except upon the application of the owners of the lode location;

Second, that, even if their first position be unsound, such ground was excepted from the placer patent by virtue of the fact that it constituted a "known lode" within the meaning of the law at the time the application was filed for patent.

To sustain the first point, appellants assume that lands upon which a lode location has been made, whether valid or invalid and whether a lode exists or not, are, by virtue of the fact of such location, necessarily withdrawn from the public domain so as not to be subject to agricultural filing or placer location. This is a mistaken view. To give to a lode location such effect it is of course necessary that a vein should exist and should have been discovered. It may be true that, as between two claimants for the same ground under lode locations, since both concede and assert that the land contains a lode and is subject to purchase as a lode claim, such location would be considered as withdrawing the land for the time being from the public domain; but, as against one locating the land as placer land or filing upon it as agricultural land, something more would be necessary than merely to show that a lode claim had been staked out and located in order to

defeat such subsequent location. It would be necessary to show that in fact a lode existed containing sufficient mineral to justify the lode location, otherwise the latter might be ignored.

This question is not, however, in the case. The appellants do not claim under the "Morning Star" location, and that location was abandoned at least long before the placer patent issued from the United States. It is not claimed by appellants that the land involved was not a part of the public domain at the time of issuance of the placer patent. At that time the government had full right to sell and dispose of the land. The patent regularly issued upon application and proofs regularly made and, as between the patentee and the Government, the title to the land in question passed. The patent, and the title which it purports to transfer, are not subject to be assailed collaterally. In order to prevail in this action it was necessary for the appellants to bring themselves within the exception of the patent itself, and to show that at the time the application for the placer patent a "known lode" existed within the lands covered by such patent.

On the second point, it is enough to say that the court below has distinctly found that there was no "known lode" within the limits of the ground in con-

troversy; indeed the court goes further and, as will appear from the opinion at page 529, holds that at the point of discovery of the "Morning Star" (where it is claimed that a well defined vein is disclosed), mineral of sufficient value was not disclosed to justify working even at this day with railway facilities and improved methods, having no existence in 1878.

The claim advanced that the court below was in error as to what constitutes a "known lode" within the meaning of Section 2333 of the Revised Statutes is not supported by the decisions.

See Dower vs. Richards 151 U. S. 658;

s. c. Richards vs. Dower 22 Pac. 304.

See also Dower vs. Richards 15 Pac. 105; 73 Cal. 477.

Sullivan vs. Iron Silver Min. Co. 143 U. S. 431.

Iron Silver Min. Co. vs. Mike & Starr G. & S. Min. Co. 143 U. S. 404.

Davis vs. Wiebold 139 U. S. 507; 11 Sup. Ct. Rep. 628.

Dahl vs. Raunheim 132 U. S. 260.

United States vs. Iron Silver Min. Co. 128 U. S. 673; 9 Sup. Ct. Rep. 199.

Deffeback vs. Hawke 115 U. S. 392.

Brownfield vs. Bier 39 Pac. 461.

What constitutes a "known lode" within the meaning of Section 2333?

"It is established by former decisions of this court that under the Acts of Congress which govern this case in order to except mines or mineral lands from the operation of a townsite patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the townsite patent takes effect; *but they must at that time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them;* and if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable for such purposes does not defeat or impair the title of persons claiming under the townsite patent."

Dower vs. Richards 151 U. S. 663.

In Davis vs. Wiebold the Court quotes with approval the language of Judge Deady in United States vs. Reed as follow?:

"The land department appears to have adopted a rule that if the land is worth more for agricultural than mining it is not mineral land although it may contain some measure of gold and silver, and the bill in this case is drawn on that theory of the law. In my judgment this is the only practicable rule or decision that can be applied to the subject. *Nor can account be taken in the application of this rule, of profits that would or might result from mining under other and more favorable conditions and circumstances than those which actually exist or may be*

produced or expected in the ordinary course of such a pursuit or adventure on the land in question."
Page 522.

In the same case the Court quotes approvingly the language of Secretary Teller:

> "The burden of proof, therefore, is upon the mineral claimant, and he must show not that neighboring or adjoining lands are mineral in character, *or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that, as a present fact, it is mineral in character; and this must appear from actual production of mineral,* and not from any theory that it may produce it; in other words, it is fact and not theory that must control your office in deciding upon the character of this class of lands. Nor is it sufficient that the mineral claimant shows that the land is of little agricultural value; he must show affirmatively in order to establish his claim that the mineral value of the land is greater than its agricultural value."

In the same opinion the Court quotes approvingly the language of the Court in the case of the Colorado Coal and Iron Company vs. the United States, as follows:

> "To constitute the exemption contemplated by the pre-emption act under the head of "known mines," there should be upon the land *ascertained*,

discovered deposits of such an extent and value as to make the land more valuable to be worked as a discovered mine under the conditions existing at the time than for mere agricultural purposes. The circumstances that there are surface indications of the existence of veins of coal does not constitute a mine,—does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. *A change in the conditions occuring subsequent to the sale whereby known discoveries are made or any means whereof it may become profitable to work the veins and mines cannot affect the title as it passed at the time of the sale.* The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual known mines *capable of being profitably worked for their product so as to make the land more valuable for mining than for agriculture the title to them acquired under the pre-emption act cannot be successfully assailed.*"

Page 524

The Court also in Davis vs. Wiebold says:

"The grant or patent when issued would thus be held to carry with it a determination of the proper authorities *that the land patented is not subject to the exception stated.* There has been no direct adjudication on this point by this court, but this conclusion is a legitimate interference from several of its decisions."

Iron Silver Mining Company vs. Mike and Starr Mining Company, 143 U. S. at page 404 the Court says:

> "It is undoubtedly true that not every crevice in the rocks nor every outcropping on the surface which suggests the possibility of mineral or which may on subsequent exploration be found to develop ore of great value can be designated a vein or lode within the meaning of the statute."

The Court quotes approvingly from United States vs. Iron Silver Mining Company the following:

> "It is not enough that there may have been some indications by outcroppings on the surface of the existence of lodes or veins of rock in place bearing gold, or silver or other metal to justify the designation of known veins or lodes. *To meet that designation the lodes or veins must be clearly ascertained and be of such extent as to render the land more valuable on that account* and to justify their exploration."

On page 405 in the same opinion the Court says:

> "*The amount of ore, the facility for reaching and working it as well as the product per ton, are all to be considered in determining whether the vein is one that justified exploitation and working.*"

In the opinion of Justice Field in the above case it is said on page 421.

> "To embrace the lode within the patent of the placer claim the applicant must, if it be known,

pay for it at the rate of $5 per acre, but he could pay any sum or offer to pay so as to be "allowed" until he can ascertain the number of acres embraced in the lode claimed, that is until the ground can be measured, nor could the officers of the Land Department accept any sum from the applicant until such measurement, upon the mere speculative opinion as to the extent of the lode."

So in the concurring opinion of Judge Field in Sullivan vs. Iron Silver Mining Company, same volume at page 441, it is said:

"Before a vein or lode can be deemed to be within the exception from the placer patent as a known lode existing at the time of the application of the patentee, a lode must be discovered and located so far as to be capable of measurement."

At page 425 same volume, Justice Field says:

"It is a matter well known to persons at all familiar with mining for the precious metals that veins rich in gold and silver are generally found with barren rock within a few feet on each side of them and that such rock more frequently than otherwise come abruptly to an end. No one thus familiar would feel justified in concluding that from mere closeness from other veins they had any necessary connection with each other."

He then quotes approvingly the language of the court in Hall vs. Equator above cited. In the case of

the United States vs. Iron Silver Mining Company, 128 U. S., which was an action to cancel patent, the court held that the issuance of the placer patent involved a determination upon the part of the land officers that the lands were placer lands and did not contain known veins or lodes and quotes approvingly from the language of the court in the Maxwell Land Grant case as follows:

> "It thus appears that the title of the defendants rests upon the strongest presumption of fact, which, although it may be rebutted nevertheless *can be overthrown only by full proof to the contrary, clear, convincing and unambiguous.* The burden of producing these proofs and establishing the conclusion to which they are directed, rests upon the government."

We fail to perceive any distinction between the case of the defendants and that of the government in assailing the patent. The defendants claim under the United States and must establish their title by proofs of the same character that would be essential in an action by the United States to cancel the patent or establish its title as against the patent to any portion of the lands covered thereby. However this may be, the evidence amply supports the findings and decree.

Respectfully submitted,